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In The

Supreme Court of the United States

October Term, 1988

ALWAN BROTHERS COMPANY, an Illinois Corporation, JOSEPH ALWAN and WILLIAM ALWAN, Individually and d/b/a ALWAN BROTHERS PARTNERSHIP

Petitioners,

vs.

JANE GNIDOVEC, DAVID TOWELL and ROBERT DAWSON

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. The Petition contains a jurisdictional defect and is in violation of Supreme Court Rule 21.1(h)

II. The Petitioners have abandoned their alleged due process violation

III. The federal question offered by the Petitioners is already before this Court for consideration

IV. Assuming the federal question presented was resolved in favor of the Petitioners the results of this action would remain unchanged

V. The Kentucky Law has not ripened; the cases cited by the Appellant are moot; and this case is inappropriate to review the law of Kentucky

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COUNTER STATEMENT OF CASE

The Respondents agree with the Petitioners' stipulation in the second sentence at page four of the Petition for Certiorari wherein Petitioners agree that the jury, as finders of fact, determined from the evidence that the Petitioners acted in a conspiracy or directed a premeditated fraudulent scheme wherein money was stolen from the Respondents.

This case was tried for ten days prior to the jury verdict. A Motion for New Trial was then filed by the Petitioners, portions of the record were transcribed and after exhaustive review, the trial Court upheld the unanimous verdict of the jury.

The Petitioners appealed to the Kentucky Court of Appeals and after examination of the record in this action, the Court stated in their opinion:

> "however upon examination of the voluminous trial record which comprised proceedings lasting ten days, it is apparent that the issue of Appellants' principal agent involvement with Larry Janssen who himself pled guilty to the fraud was appropriately a question for the jury. There was *overwhelming evidence* of the Alwan brothers' connection with Janssen, i.e., Janssen's residence on their farm, their extensive business relationship, common legal counsel, Janssen's introduction before a group of investors as being an agent of Willie Alwan, and also as a partner." (Emphasis added)

The Petitioners were then granted discretionary review to the Supreme Court of Kentucky who again examined the record of evidence against the Petitioners. In their opinion, the Court stated:

"the record is replete with evidence concerning a fraudulent scheme which was perpetrated against many investors in various states."

Respondents will not burden this Court with the extensive rendition of the overwhelming evidence cited in the Appeal's Court Opinion. It appears that the jury and three Courts are all in agreement that the Petitioners herein were engaged in a course of conduct which was malicious, fraudulent and intentional.

Many of the statements of fact as alleged in the Petition for Certiorari are incorrect, do not accurately reflect the record, and are in many instances directly rebuttable by the record.

Additional facts will be cited to this Court as they apply to specific arguments in opposition to the Petition for Certiorari.

ARGUMENT

THE PETITION CONTAINS A JURISDICTIONAL DEFECT AND IS IN VIOLATION OF SUPREME COURT RULE 21.1 (h)

U. S. Supreme Court Rule 21.1 (h) requires:

"If review of the judgment of a State Court is sought, the statement of the case shall also specify the stage of the proceedings both in the *Court of first instance* and in the Appellate Court at which the Federal question sought to be reviewed were raised; the method or manner of raising them and *the way in which they were passed upon by the Court;* such pertinent quotation of specific portions of the record, or summary thereof, *with specific references to the place* and the record where the matter appears (e.g. ruling

> on exception, portion of Court's charge and exception thereto, assignment of errors) as will show that the federal question *was timely and properly raised* so as to give this Court jurisdiction to review the judgment on writ of certiorari." (Emphasis added)

The Petition for Certiorari does not cite a portion of the record wherein the alleged federal question is requested for ruling in the Court of first instance because there was never even the generic mention of the Constitution throughout the proceedings before the trial Court below.

This failure to request relief was observed by the Supreme Court of Kentucky in their opinion.

> "As to the punitive damages argument, Movants Brief again in violation of Ky. CR 76.12 (4) (c) (iv) fails to contain any statement at the beginning of the argument concerning the preservation of the alleged error for review."

However, even with that finding, the Supreme Court of Kentucky, in an effort to give justice to the Petitioners, did review the record to determine the adequacy of the evidence and the arguments of the Petitioners.

This Court in *Webb v. Webb*, 451 U.S. 493, 501, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) stated:

> "There should be no doubt from the record that a claim under a federal statute or the federal constitution was presented in the State Courts, and that those Courts were apprised of the nature of the substance of the federal claim at the time and in the manner required by the state law."

Due to this failure, this Petition should be dismissed.

THE PETITIONERS HAVE ABANDONED THEIR ALLEGED DUE PROCESS VIOLATION

It is true that the Kentucky Court of Appeals in a concurring opinion expressed feelings on the need for guidance in the punitive damages field.

If this Court decides that this concurring opinion does constitute a sufficient preservation of a federal question, the Petitioners abandoned that right in the Supreme Court of Kentucky.

The Supreme Court of Kentucky in an unanimous opinion states that:

> "At oral argument, Movants' counsel stated that he would make no argument that punitive damages should be denied continued viability in this State, only the amount of the punitive damages awarded in this case were excessive."

In a Petition for Rehearing, the Petitioners argued that the Court's memory of the Peitioners' oral argument was incorrect. The Supreme Court of Kentucky undanimously refused to modify the opinion.

This Court in the action of *Mishkin v. New York*, 383 U.S. 512-513, 16 L. Ed. 2d 56, 86 S. Ct. 958 stated that there is a danger in reviewing actions which were refused to be argued in the State Court due to the possibility that the record would not contain sufficient clarity to require or justify a review of their decision making process.

It is submitted that this record does not have the clarity to offer this Court proper examination of the federal question presented by the Petitioners.

THE FEDERAL QUESTION OFFERED BY THE PETITIONER IS ALREADY BEFORE THIS COURT FOR CONSIDERATION

The federal question offered by the Petitioners at page i of their Petition for Certiorari is admitted by the Petitioners to be the subject of *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposable, Inc.*, Docket No. 88-556.

Because this question is already before this honorable Court for review, there is no need for the inclusion of this action. The Petition for Certiorari demonstrates no unique characteristices of this case which would offer this Court any different alternative for discussion of the federal question than that which will be brought before this Court for consideration in the *Browning Ferris* case.

THE FACTS IN THIS ACTION DO NOT APPLY TO THE FEDERAL QUESTION OFFERED BY THE PETITIONERS

The Petitioners, having become aware of this Court's announcement to accept the federal question proposed in the *Browning Ferris* case, now attempt to bend their claim of excessive damages into a federal question. In interpreting 28 U.S.C. 1257 (2) [28 U.S.C.S. (1257) (2)] in *Banker's Life and Casualty Co. v. Crenshaw,* 468 U.S. ___, 100 L. Ed. 2d 62, 108 S. Ct. ___ (1988) this Court ruled that the size of a punitive damage award does not fail within the Appellate jurisdiction of this Court.

The Petitioners now request this Court to review a claim of excessive damages. If reviewed, this argument would fail.

In objecting to the excessiveness of the verdict, the Petition for Certiorari is most vocal in its objection to the $250,000.00 punitive damage award to Jane Gnidovec when her compensatory damages amounted to $6,000.00.

An examination of the record will reveal that in 1976, Jane Gnidovec was a shop girl in a market in Spring Valley, Illinois. She convinced her father to co-sign for a $6,000.00 loan. She invested this money in the Petitioners' fraudulent cattle scheme. Her "investment money" was then stolen. When she filed litigation in Illinois, the Petitioners retained an attorney who delayed her litigation. (TE 255) During the delay, they promised to take care of her. (TE 55) During the delay, they travelled throughout the south with Larry Janssen (TE 260) and finally purchased farms in Bowling Green, Kentucky, where they could relocate their cattle fraud scheme. (TE 203) The attorney they had hired in Illinois then agreed to a judgment against the judgment proof participant in the cattle conspiracy, Larry Janssen. (TE 255) Jane Gnidovec served Janssen to initiate the litigation in care of the Petitioners' meat market. (TE 60) She later served Janssen with notice for deposition for discovery of assets at the Petitioners' farm, (TE 101) however the Petitioners moved Jane's cattle to Kentucky and out of the jurisdiction of Illinois. (Ex. 11) The Court in Illinois issued an Order to arrest Janssen if he appeared in Illinois, but he was never found again in the state.

The Petitioners then told Gnidovec that they would return her cattle from Kentucky, but they were quarantined. (TE 104) She proceeded to Kentucky and filed this litigation where she discovered that the cattle she had purchased were part of 116 head of cattle that had been

taken by the Petitioners and Janssen from Dr. E. H. Hall in Oklahoma in 1974. Dr. Hall had also sued the Petitioners for these cattle. (Ex. 6)

In Bowling Green, Kentucky, Gnidovec discovered that the cattle that she had purchased had now been once again sold to David Towell and Robert Dawson and other defrauded investors. The Petitioners herein refused to submit for discovery on four different occasions and provided no discovery throughout the pretrial proceedings. They obtained continuances by the manipulation of the trial docket and by the substitution of attorneys when the trial date became near. They utilized similar manipulations of trial dockets in other cases where investors sued the Petitioners. The Petitioners committed purgery on numerous occasions during the trial. (TE 334) (TE 339) (TE 459) (TE 580) (TE 835) (TE 259) (TE 469) (TE 306) (TE 588) (TE 596)

Finally, a unanimous jury awarded her the above damages and yet four years later she has still not received any compensation for the money stolen from her.

The above rendition of facts clearly demonstrates that the jury verdict of $250,000.00 in punitive damages is totally justified in relation to the $6,000.00 theft of Gnidovec's money in 1976.

ASSUMING THE FEDERAL QUESTION PRESENTED WAS RESOLVED IN FAVOR OF THE PETITIONERS THE RESULTS OF THIS ACTION WOULD REMAIN UNCHANGED

In the Petition for Certiorari, this Court is asked to grant unto the Petitioners the same due process rights

under the Constitution of the United States for their property interest as would be granted unto a criminal defendant facing the death penalty. Let us, for the sake of argument, agree to this proposition and analyze the facts of this action under this enhanced standard.

A. No Specific Violation Alleged

In a criminal action a Defendant cites to the Court specific instances wherein his rights of due process were offended. For example, a defendant may allege that he was beaten and bludgeoned and therefore his confession was obtained under duress; or a defendant may allege that he requested an attorney and that request was denied, and evidence was then secured against him; or a defendant may allege that a search occurred without a warrant and without good faith on behalf of the arresting officers.

In this case, the Petition cites no specific instance of unfairness by the lower Court which would violate the Petitioners' constitutional rights to due process.

The Petitioners mentioned that their trial was not bifurcated. The Petitioners moved the Court for joint and severable liability and agreed to the non-bifurcation. (TE 943, 947-948) The Petitioners mention opportunity to be heard and lack of notice, however, in this case four years transpired between the filing of the Complaint and the trial of this action. The Petitioners refused to appear for depositions at any time prior to trial, (Trial Record pgs. 74, 79, 88, 100) and all discovery requested by the Petitioners was fully complied with by the Respondents.

In their brief, the Petitioners mention a standard of clear and convincing proof. The instructions submitted to the jury were submitted with agreement of the Petitioners.

B. The Good Faith Test

An emerging standard expressed by this Court in analysis of due process violations is a standard of good faith. The Petitioners completely fail the test of good faith. Proof was introduced to the jury of several different fraudulent cattle schemes involving the Petitioners. A newspaper article was introduced by agreement (Ex. 10) and states as follows:

> "In all nearly $500,000.00 in claims were made after the operation folded at the end of 1970. None of the investors' money was returned. Janssen subsequently lost the Washburn farm and was placed on five years probation for lying on a loan application, and the family farm and 20 acres of property were purchased by the Alwan Brothers Meat Market of Peoria, Illinois."

The Petitioners' claimed to be Janssen's victims in this 1970 fraudulent scheme. (TE 826) The Petitioners always ended up with title to the assets used in the schemes (TE 196) while Janssen was judgment proof. (TE 601, TE 167-168) It was proven that the Petitioners and Janssen commingled cattle on a 900 acre farm in 1975 and 1976 in Illinois. (TE 278) And, once again, the Petitioners claimed they were victims of Janssen's fraudulent cattle schemes.

In 1974, Dr. Hall's cattle in Oklahoma were transported from Oklahoma to the Petitioners' farm, and Hall

has never been paid for those cattle. (Ex. 6) In the Kentucky fraud scheme, (1977-1980) over $250,000.00 was converted into cash and disappeared (TE 349) and the Petitioners were once again victims of Janssen's fraud scheme.

In Illinois, the Petitioners recovered insurance for their stolen cattle. (TE 317-318) In Kentucky, they made an insurance claim for their stolen cattle. (TE 691)

The Petitioners come into this Court with unclean hands and in bad faith and their participation in this sophisticated premeditated cattle fraud scheme should deny their application for relief.

C. Appointed Versus Retained Counsel

Another aspect relating to the criminal application of due process is the consideration of whether the Petitioners had appointed or retained counsel. The record in this action will reveal that the following attorneys have been retained to counsel the Petitioners in these proceedings: Joseph Huddleston, Lou Amato, Mark Flener, again Joseph Huddleston, Philip Huddleston and as counsel from Illinois, attorneys Bernard Ghiglieri, Jr. and Barry Barash.

It is difficult to conceive, that with all of this legal advice, the Petitioners have been denied their due process rights. The Petitioners cannot demonstrate one specific allegation of a violation of their rights in the Kentucky Courts.

THE KENTUCKY LAW HAS NOT RIPENED; THE CASES CITED BY THE APPELLANT ARE MOOT; AND THIS CASE IS INAPPROPRIATE TO REVIEW THE LAW OF KENTUCKY

The Petitioners cite to the Court at page nine of the Petition for Certiorari two recent rulings of the Kentucky Supreme Court relating to the boundaries of punitive damages. *Fowler v. Mantooth,* Ky. 683 SW 2d 250, v. 254 (1984) and *Horton v. Union Light, Heat & Power Co.,* Ky. 690 SW 2d 382 (1985).

Both of these actions concern negligence, which is not the subject matter of this case; however, both of these actions are now moot. The Kentucky Legislature since the 1985 ruling in *Horton v. Union Light, Heat & Power Co.* has enacted legislation limiting awards of punitive damages. The new legislation specifically requires a standard of clear and convincing proof, and a finding of willful or malicious conduct.

The law of punitive damages as expressed by the Kentucky Supreme Court in *Fowler v. Mantooth* and *Horton v. Union Light, Heat & Power Co.* is in contradiction to this statute. In the near future, the Kentucky Court will have to face the question of the constitutionality of the new legislation in restricting the award of punitive damages and either strike the legislation as unconstitutional or modify thier ruling in the two cases cited by the Petitioners. The future decision required of the Kentucky Supreme Court would be proper forum for review of the Kentucky standards for due process in punitive damage cases.

CONCLUSION

It is respectfully submitted that the thrust of the Petition for Certiorari is based on personal motivation, personal reasons only for the benefit of the Petitioners, and that no national questions are included in the facts of this action. The Petition for Certiorari should be denied.

Respectfully submitted,

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